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No. 88-1064

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

CLAYTON KENDALL MILLER, III,

Petitioner,

vs.

CONAGRA, INC. and PEAVEY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Given the fact that Miller's action in the district court sought only a declaratory judgment delineating the procedures attendant to the statutorily mandated arbitration proceeding, and the declaratory relief having been so granted, is the ultimate substance of the arbitrators' report properly at issue in this case?

2. Assuming that the arbitrators' report is properly at issue, is a unanimous decision rendered by an arbitration panel, appraising the value of stock pursuant to the Minnesota dissenting shareholder's statute providing for binding arbitration, subject--in the absence of any evidence of bad faith--to judicial review?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties appearing in the caption of this case were the only parties to the proceedings in the court of appeals. Pursuant to Rule 28.1 of the Supreme Court Rules, the following comprises the current list of all parent companies, subsidiaries and affiliates of Peavey Company and ConAgra, Inc.:

Ace Ltd. Bermuda
Aliexport S.A.
Antonio Luis Da Mata, Herdeiros, LDA.
Avipronto Sociedade Transformadora de Productos Alimentares, Ltda.
BDR (Grain) Limited
BDR (Sales) Limited
Berdex International, Inc.
Bioter S. A.
Bumi-Woodward Sdn. Bhd.
Canadian Harvest Process USA
Canadian Harvest Process (1986) Ltd. (owned by Ducon II)
Champaca Co. Ltd.
Compania Canaria de Peinsos, S.A.
ConAgra Internacional Comercio de Productos Agro-Alimentaras, Ltda.
ConAgra International, Inc.
ConAgra International, S.A.

ConAgra Uluslararasi Ortadogu Dis
Ticaret Anonim Sirketi
Ducon I
Ducon II
EWOS Bioter S.A.
Excel, Ltd. Bermuda
Fossil Creek Farms
Franz Albers GmbH, Hamburg
Geldermann Limited
Hansa - Muhle Verwaltungsge -
Sellchaft mbH
Hansa - Muhle Verwaltungsge -
Sellchaft mbH & Co. KG
Harbor Partners Limited
Partnership
Hoeing & Co. GmbH
Incosoja-Industrias Conjuntas de
Soja Ltda. Sao Paulo/Brasilien
Kurt A. Becher
Unterstutzungskasse GmbH
Lamb-Weston
Lion ConAgra
MCPA Task Force
Molecular Genetics
Nittoh Bion KK
NutriMex S.A. de C.V.
Park Hotel GmbH, Bremen
Plange Kraftfutterwerke GmbH
& Co. KG
Plange Kraftfutterwerke
Verwaltungs-gesellschaft mbH
ReCo Kraftfutterwerke GmbH
SIPCo International, Inc.
SIPCo Truckline, Inc.
Sabeco Kurt A. Becher Comercio
Industria, Ltda.
Sankyo Boeki K.K.
Sapropor S. A.
Swift Independent Corporation
Swift Independent Holding Company
Swift Independent Packing Company
Swift International Sales Corp.
Taisei Corporation Inc.

Trans-Agra Internacional S.A.
de C.V.
Trident Two Corporation
Val-Agri, Inc.
Willow Creek Talc, Inc.
Woodward and Dickerson Do Brasil
Representacao, Importacao and
Exportacao, Ltda.
Woodward & Dickerson Trading
Philippines, Inc.
1050 Sansome Corporation
24D Task Force

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported (Pet. App. at 11). The July 23, 1986 decision and order of the district court is also unreported (Pet. App. at 34).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1988. A petition for rehearing en banc was denied on August 25, 1988. The Petition for a Writ of Certiorari was filed on November 22, 1988. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1332. In affirming the district court's dismissal of Petitioner's action, the court of appeals held that contrary to Petitioner's contention, the district court had no jurisdiction to examine the merits of the arbitration panel's

determination of the fair cash value of Miller's stock (Pet. App. at 11).

Respondents submit that based on Minnesota law and this Court's decisions, this Court similarly should decline to examine and review the unanimous decision of an arbitration panel where Petitioner has failed to adduce evidence of bad faith.

Respondents further submit that, based upon the relief sought and obtained in the declaratory judgment proceedings below, the substance of the arbitration panel's valuation report is not properly (jurisdictionally) before this Court--just as it was not properly before the court of appeals.

STATUTES INVOLVED

The relevant provisions of the Minnesota Business Corporation Act §§301.40 and 301.44 as well as the

Minnesota Uniform Arbitration Act §§572.16 and 572.20 are set forth as Respondents' Appendix A ("Resp. App.") hereto.

STATEMENT OF THE CASE

1. The Peavey-ConAgra merger.

On July 20, 1982, defendant/respondent Peavey merged with a wholly-owned subsidiary of defendant/respondent ConAgra, Inc. (collectively referred to as "Peavey"). The transaction, a reverse triangular merger, carried a transaction price of $180 million. At the time of the merger, plaintiff/petitioner Clayton K. Miller, III ("Miller") owned 1,100 shares of the 5,874,242 shares of issued and outstanding Peavey stock.

Before the merger was announced, Peavey stock had traded at $18.00 per share on the New York Stock Exchange. By the day of the announced merger, Peavey

shares were publicly traded at $26.00 per share. As a shareholder, Miller was offered cash and/or ConAgra stock worth $30.00 per share in exchange for consenting to the merger and tendering his Peavey stock. Miller was the only one of Peavey's 2,552 shareholders who rejected the tender offer and dissented from the merger. Under the Minnesota dissenting shareholder's statute--§§301.40 and 301.44 of the Minnesota Business Corporation Act[1] ("M.B.C.A.")--a dissenting shareholder can sell his stock to the corporation for "fair cash value." If the shareholder and the corporation cannot agree on a price for the stock, the fair cash value of the stock at the time of the merger is to be determined by three disinterested appraisers in a

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1 Sections 301.40 and 301.44 have been superseded by the Minnesota Business Corporation Act of 1984. The new statute does not apply retroactively.

proceeding pursuant to M.B.C.A. §301.40(2).

After Peavey received Miller's dissent, it tried to negotiate a fair price for Miller's shares. Miller refused to negotiate or to set an asking price for his shares. The matter thus became one for arbitration. Even after the arbitrators were empaneled and had informed the parties that the expense attendant to an appraisal proceeding would likely exceed the value of Miller's stock (and thus requested the parties to negotiate a settlement), Miller would not cooperate.[2] Throughout the course of his

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[2] Peavey's final offer of $39,000.00 for Miller's 1,100 shares was (1) equal to the $30.00 per share tender offer price accepted by all other shareholders coupled with additional compensation for expenses incurred by Miller in pursuing his dissenting shareholder's rights; (2) significantly greater than the $26.00 per share price at which Peavey stock was publicly traded on the date of the merger; and (3) almost double the $18.00

(footnote continued)

dispute with Peavey, Miller has adamantly refused to negotiate a price for his stock.

2. Miller's declaratory judgment action.

The parties' disagreement as to how the arbitration proceeding was to be conducted led Miller to bring a declaratory judgment action against Peavey in the United States District Court for the District of Arizona on June 25, 1983. Miller's First Amended Complaint, filed October 13, 1983, (attached hereto as Resp. App. B) requested the district court to delineate the procedures attendant to a dissenting shareholder's appraisal proceeding pursuant to M.B.C.A. §§301.40 and 301.44. Miller's First

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(footnote continued from previous page) per share price at which Peavey stock was publicly traded immediately prior to the announcement of the merger. Miller rejected all of Peavey's offers and never made a counteroffer.

Amended Complaint sought neither monetary nor equitable relief beyond the court's issuance of a declaratory judgment. Nor did Miller ask the court to decide issues pertaining to the value of Miller's stock. Rather, Miller requested the court to resolve issues relating to the procedures that would ultimately govern the appraisal proceeding -- i.e., whether §301.40(2) (1) allowed discovery prior to the arbitration proceeding; (2) required Peavey to pay for the costs associated with the arbitrators and the appraisal proceeding; and (3) allowed the right to subpoena documents, to compel witnesses to attend, to have witnesses testify under oath, to cross examine witnesses as well as other procedural rights. (Resp. App. B-18 at XXIII.)

3. The district court's judgment resolving the procedural issues governing the appraisal of Miller's stock.

On November 23 and December 27, 1983, Peavey moved and Miller cross-moved for summary judgment, asserting that there were no genuine issues of material fact as to the procedures attendant to an appraisal under M.B.C.A. §301.40(2). The parties did not request that the district court determine the value of Miller's stock in Peavey. On February 27, 1984, the United States District Court for the District of Arizona, Chief Judge Richard M. Bilby, presiding, entered its judgment setting forth the procedures that would govern the appraisal of Miller's stock by an arbitration panel (Pet. App. at 36). The district court retained jurisdiction over the matter only "for the purpose of issuing any further Orders as may be appropriate and

necessary until the delivery of the [arbitrators'] decision to the parties." (Id. at 41-42, ¶14; emphasis supplied.) Miller did not appeal that judgment to the court of appeals.

4. The arbitration panel and its report.

The parties selected a panel of three arbitrators in accordance with the Minnesota dissenting shareholder's statute (one designated by Miller, one chosen by Peavey and the third jointly selected by the two arbitrators). The arbitration panel's unanimous decision--culminating a two-year appraisal proceeding which cost Peavey over $94,000.00--is contained in a 145-page arbitrators' report transmitted to the district court on April 22, 1986 and made a part of the record on appeal by order of the district court of March 24, 1988. The arbitrators' report, titled "Peavey Company Valuation as of

July 20, 1982 by Court-Appointed Arbitration Panel,"[3] dated March 31, 1986, concluded that the value of Miller's stock at the time of the merger was $30.00 per share--exactly the price offered by ConAgra to Peavey's shareholders at the time of the merger.

The arbitrators based their decision on (1) the merger negotiations among Peavey, ConAgra and their financial advisors in arriving at the transaction price; (2) the historical performance and future prospects of Peavey; (3) the comparative value of other similar equity investments; and (4) the relationship of Peavey's common shares to the value of the Company's underlying assets less liabilities if the assets were sold

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3 Based on the manner in which the arbitrators were chosen (viz., pursuant to the Minnesota dissenting shareholder's statute), the title of the report is inaccurate. The district court did not select the arbitrators.

separately and apart from the business. The arbitrators interviewed members of Peavey's top management, Peavey's financial advisor and ConAgra's chief executive officer and analyzed Goldman Sachs' "fairness opinion" (which concluded that the merger and transaction price were fair from a financial viewpoint).

The arbitrators' report concluded:

> (a) Peavey was struggling in the flour business, and returns on its retail business were subpar. No rebound in the grain merchandising business was expected for three to five years, and no buyer was interested in Peavey other than ConAgra.
>
> (b) A year before the merger, Peavey's stock had traded at an average of $23.47 per share

(with an 1982 midpoint of $20.50), an amount lower than Peavey's book value of the stock. This reflected the fact that the return on shareholder equity had been "low, sub-par, and declining." Peavey's market price had dropped below book value because the prospects for future returns were deemed by the market to be inadequate to support Peavey's level of historical investment.

(c) The merger price of $180 million was almost identical to Peavey's book value. There was no inconsistency in the merger price not representing a premium over book value in light of the fact that Peavey's historical returns had resulted in the market price generally well below

book value. Further, the merger price compared favorably to the price-to-earnings ratios which Peavey achieved in the market.

(d) Peavey's directors owned or controlled 19% of its stock prior to the merger. No special deals or "golden parachutes" had been given to the directors. By selling their stock for $30.00 per share, the directors, as Peavey shareholders, had maximized their investment.

(e) Two banking institutions owned 30.3% of Peavey's stock in a fiduciary capacity. It was telling that these fiduciaries considered the merger to be in the best interests of their clients.

(f) Based on an in-depth net asset evaluation, the merger price of $30.00 was fair relative to the underlying assets. Miller's contention that the value of Peavey's underlying assets had a net asset value equal to their cost of replacement less an allowance for accumulated depreciation overlooks functional and economic obsolescence as well as the special purpose and nature of most of Peavey's fixed assets.

(g) The value of Peavey's underlying assets affect the value of stock either (1) to the degree to which the assets produce income or (2) to the degree to which the assets can be separated from the operating business and exchanged for cash.

The value of Peavey's assets was subject to the same downward pressures as its equity securities.

(h) To the extent assets were retained by Peavey, their value would be reflected in the market price of Peavey's stock based upon the projected income-producing ability of those assets. Alternatively, the net value of Peavey's assets could be evaluated through their hypothetical liquidation. A liquidation creates a "buyer's market" and would result in a number of liabilities not yet on the balance sheet, such as unfunded pension liabilities. Assuming arguendo that Peavey could have sold all of its assets at

historical cost and that there would be no unfunded liabilities ("optimistic" assumptions), the $180 million merger price favorably compared with liquidation estimates ranging from $106 million to $181 million. Thus, nothing suggests that Peavey's assets could have been liquidated with a resulting per share value proceeds, net of all costs and liabilities, equal to or greater than the transaction price.

While Miller steadfastly had refused to negotiate with Peavey and had demanded to proceed to arbitration, Miller refused to attend the arbitration proceeding. Miller did not provide the arbitrators with any information to buttress his contention that Peavey's net assets had an aggregate value which exceeded the

transaction price. Further, Miller never informed the arbitrators what he considered to be the fair cash value of his shares.

5. The district court's order of dismissal.

Miller expressed disagreement with the arbitration panel's determination of his stock's value at a June 23, 1986 status conference before the district court. Miller claimed that the appraisal proceeding was unfair because it had not determined Peavey's net asset value. He requested the district court to remand the report to the arbitrators and order them to use a different appraisal method. On July 23, 1986, the district court dismissed Miller's action, ruling that the arbitrators had complied with M.B.C.A. §301.40(2) as well as its February 27, 1984 declaratory judgment (Pet. App. at 34). The district court

did not examine the merits of the arbitration panel's determination of fair cash value.[4]

6. Miller's appeal to the Ninth Circuit.

On August 13, 1986, Miller filed an appeal from the district court's order of July 23, 1986 in the United States Court of Appeals for the Ninth Circuit. While Miller had been represented by counsel throughout the proceedings before the district court, he appealed pro se to the Ninth Circuit. The matter was submitted without oral argument. The Ninth Circuit had jurisdiction of the appeal pursuant to 28 U.S.C. §1291 (appellate review of final decisions of district courts).

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4 The district court had retained jurisdiction of the case, following its entry of declaratory judgment, solely for the purpose of monitoring the implementation of the arbitration procedures which were the subject of both the declaratory judgment action initiated by Miller and the district court's resulting ruling. (Pet. App. at 41-42.)

In its decision dated April 29, 1988, the Ninth Circuit affirmed the district court's decision, holding that: "Clearly, Section 301.40(2) and Minnesota case law provided no jurisdiction to the district court to examine the merits of the arbitration panel's determination of the fair cash value of Miller's stock" (Pet. App. at 20). On August 25, 1988, Miller filed a petition for rehearing en banc, which was unanimously denied. Miller's Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The court of appeals' decision does not conflict with any decision of this Court or any other federal court of appeals. An important question of federal law is not at issue here. At most, this case only concerns a challenge to binding arbitration under the former

Minnesota dissenting shareholder's statute. In actual fact, this case, as pleaded, involves far less. It concerns the proper procedures to be used in the arbitration process. The district court ruled upon those procedures, and that ruling is not in dispute before this Court.

2. Miller views this case as a vehicle for the clarification and preservation of shareholders' rights. (Pet. at 7.) However, the court of appeals declined to reach the issue of the merits of the arbitrators' decision as to the value of Miller's stock. Rather, the court of appeals affirmed the dismissal of the case solely on the narrow basis that it lacked jurisdiction absent a showing by Miller of fraud or bad faith on the part of the arbitrators.

3. The questions Miller presents for review are divorced not only from the record before the lower courts but also from those courts' decisions.

INTRODUCTION

Under Minnesota law, Miller demanded and received a full appraisal proceeding to determine the fair market value of his shares as of the time of the merger. The district court lent its assistance in clarifying the procedures applicable under Minnesota law. After two years and over $94,000.00 in appraisal expenses to Peavey, the three appraisers--including the appraiser chosen by Miller--agreed that the $30.00 per share offer fairly represented the value of the Peavey stock.

Long after the district court had entered its declaratory judgment, Miller

asked the court to instruct the arbitrators to reappraise the shares in the fashion preferred by Miller, namely, an item by item physical appraisal of each item of physical property (from pencil sharpeners to silos) owned by Peavey. The district court found that the arbitrators had complied with the Minnesota dissenting shareholder's statute as well as its declaratory judgment governing the appraisal proceeding and dismissed Miller's Complaint. The court of appeals affirmed.

Miller's Petition should be rejected as a matter of law because (1) his requested relief far exceeds the limited focus of the case before the district court, and (2) the binding arbitration was carried out in good faith. Miller's Petition should be rejected as a matter of conscience because the $30.00 price

offered by ConAgra was fair. It was above market value. It was approved by Peavey's board of directors and independent investment bankers. The same price was offered to all shareholders--large and small--and all accepted the offer (except Miller). Miller thereafter received the full appraisal to which he was entitled.

Miller interprets his string of defeats in this action as a demonstration that the system is "fixed." If anything, this case demonstrates just how far the system goes to safeguard the rights of individual shareholders. Miller's view is that "everyone is out of step but Miller"; however, his arguments do not stand up to legal or factual scrutiny.

I. MILLER'S PETITION IS JURISDICTIONALLY DEFECTIVE BECAUSE IT RAISES ISSUES THAT WERE NOT BEFORE THE DISTRICT COURT.

Miller's First Amended Complaint in this action sought declaratory relief for the sole purpose of clarifying procedural issues relating to the manner of conducting the dissenting shareholder arbitration proceedings. (Resp. App. B-18 at XXIII.) The declaratory relief which Miller sought was granted by the district court by declaratory judgment entered February 27, 1984. (Pet. App. at 36.) In turn, the district court retained post-judgment jurisdiction of the case for the limited purpose of assuring that the arbitration proceedings were conducted in accordance with the court's February 27, 1984 Judgment. (Id. at 41-42.) The court, by order of July 23, 1986, concluded that they were. (Pet. App. at 34.)

The issue of whether Miller's stock was properly valued by the arbitration panel was not the subject of Miller's action. It was not ruled upon by the district court. Nonetheless, over the objections of Peavey, the court of appeals erroneously treated Miller's appeal as if the issue had been properly raised in the district court. In fact, the substantive issue of the stock's value was not before the district court, was not properly before the court of appeals, and is not properly before this Court. For this reason alone, Miller's Petition should be denied.

However, because (1) Miller's Petition is based entirely upon the stock valuation issue and (2) the Ninth Circuit ignored Peavey's argument that that issue was not properly under consideration,

Peavey responds--though regretfully--to the valuation arguments raised by Miller.

II. MILLER PROVIDES NO SUPPORT FOR HIS ASSERTION THAT THE ARBITRATORS' REPORT IGNORED FEDERAL LAW AND GENERALLY ACCEPTED METHODS OF VALUING SHARES.

Miller repeatedly charges that the arbitration conflicts with federal law and generally accepted appraisal procedures (Pet. at 2, 3, 4). Yet, nowhere in his Petition does he support these assertions. Miller cites no federal laws that have supposedly been violated.[5] Likewise, Miller does not adduce authority for the proposition that the arbitrators ignored generally accepted appraisal procedures.[6] Indeed, the

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5 As a dissenting shareholder to the merger of a Minnesota corporation, Miller asked for and received an appraisal pursuant to Minnesota law (M.B.C.A. §§301.40 and 301.44), not federal law.

6 The court of appeals refused to review the merits of the arbitrators' decision since Miller presented no (footnote continued)

closest Miller comes to providing facts to support his summary charge that "the accounting data suggests value over the $30.00 per share my shares are supposed to be worth" (Pet. at 3) is a citation to the "Addendum SEC filings, page 25 and 26." (Id. at 17.) While Peavey's unaudited financial statements showed assets greater than the purchase price ($443 million vs. $180 million), liabilities of $262 million were also reflected. The bottom line of assets minus liabilities, denominated in the financial statements as "shareholders' equity," was $182 million--virtually

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(footnote continued from previous page) evidence of bad faith or fraud (Pet. App. at 18). Peavey and ConAgra support the court of appeals' position that there is no jurisdiction to review the merits of the arbitrators' report in the absence of a showing of fraud or bad faith, and argue, alternatively, that the conclusion of the arbitrators was completely meritorious.

identical to the $180 million merger price.

In contrast to Miller's superficial and emotionally charged analysis, the arbitrators' report demonstrates a thoughtful and well-reasoned value analysis. In unanimously concluding that the $30.00 per share represented the fair value for Peavey stock as of July 20, 1982, the three disinterested appraisers (one appointed by Miller) relied on a variety of methods to value the shares at the time of merger. (St. of Case at 10-16.) Each of the criteria the arbitrators applied was analyzed in detail in the course of their lengthy report. Miller's theory that a physical appraisal should have been performed for each item owned by Peavey in 1982 was specifically considered and rejected by

the arbitrators as economically invalid. (Id. at 14-16.)

III. MILLER FAILS TO SUPPORT HIS CHARGE THAT THE MINNESOTA LAW PROVIDING FOR BINDING APPRAISAL IS UNCONSTITUTIONAL.

Again, respondents are left to their own imagination as to the basis of Miller's charge that the Minnesota appraisal law is unconstitutional. (Pet. at 3.) Miller cites no particular constitutional provision, nor any relevant judicial decision.[7] Moreover, it was Miller--not Peavey--who invoked the very statutes that he now attacks as unconstitutional.

The constitutionality of Minnesota's binding appraisal procedure may be established by reference to a federal analogue, the Federal Arbitration Act

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[7] For purposes of this discussion, Peavey assumes that Miller is referring to the United States Constitution, though this is not necessarily clear.

(9 U.S.C. §§1-14). Like the Minnesota Act, the decision of the arbitrators under the Federal Arbitration Act is final and binding. An arbitration award under the Federal Arbitration Act may be vacated only if (a) the award was procured by fraud, corruption, or undue means; (b) there was evident partiality or corruption on the part of the arbitrators; (c) misconduct of the arbitrators prejudiced the rights of any party; or (d) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made. (9 U.S.C. §10.) Cf. Minnesota Uniform Arbitration Act, §572.16. 9 U.S.C. §11 permits the modification or correction of an award if there is a material miscalculation, a mistake of description, or an imperfection in form. These standards have

consistently been applied by the federal courts without any suggestion that the Federal Arbitration Act fails to pass constitutional muster. See, e.g., Sentry Life Ins. Co. v. Borad, 759 F.2d 695 (9th Cir. 1985), The Hartbridge, 57 F.2d 672 (2d Cir. 1932), cert. denied, sub nom. Munson S.S. Lines v. North of England S.S. Co., 288 U.S. 601, 77 L. Ed. 2d 977, 53 S. Ct. 320 (1933).

Just as Minnesota courts have consistently upheld the validity of binding arbitration, so too has this Court. United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. _____, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987).[8] In holding that the Fifth Circuit Court of Appeals had exceeded its authority in vacating an arbitrator's

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[8] The reasoning of Misco, while in the context of collective-bargaining arbitration, has equal application to this action.

award and in substituting facts of its own, the Court explained:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. . . . But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of its authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

98 L. Ed. 2d at 299. Courts therefore have "no authority to disagree with" the arbitrator's "honest judgment."[9]

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[9] An arbitrator's award should thus be final and not subject to judicial second-guessing unless there is fraud or dishonesty (98 L. Ed. 2d at 302) or where an arbitrator's judgment is contrary to well defined and dominant public policy. W.R. Grace & Co. v. Local Union 759, Int'l. Union of the United Rubber Workers, 461 U.S. 757, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983).

Misco narrowly construes the public policy exception. Vague and amorphous notions of public policy should not (footnote continued)

98 L. Ed. 2d at 299. Miller's claim that Minnesota's binding appraisal statute is unconstitutional is thus entirely unsupported.

IV. MILLER'S POSITION IS NOT SUPPORTED BY SMITH V. VAN GORKOM.

Miller complains that the district court and the court of appeals overlooked Smith v. Van Gorkom. (Pet. at 7.) One possible reason, in addition to the fact that Miller never cited Van Gorkom to the

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(footnote continued from previous page) disturb an arbitrator's judgment. 98 L. ED. 2d at 302. The Court determined that the public policy reasons justifying a court's refusal to enforce an arbitration award must be rooted in "well defined and dominant . . . 'laws and legal precedents and not from general considerations of supposed public interests.'" Id., quoting Muschany v. United States, 89 L. Ed. 744, 756 (1945). Miller's peculiar notions of public policy (wholly beyond the record in this case) and his self-described appointment to protect beleaguered shareholders from the "International Bankers" do not reasonably fit within any cognizable public policy.

court of appeals, is that Van Gorkom is completely irrelevant to Miller's action.

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), evaluated the business judgment rule in the context of a board of directors' decision to recommend a merger. The Delaware Supreme Court held that members of the board of directors were not immunized from personal liability by the business judgment rule when they were grossly negligent in their review and analysis of the proposed merger.

In contrast, Miller's action is not against a board of directors. He is seeking to remand an appraisal conducted under M.B.C.A. §301.40(2). The standard of review for such an appraisal is not the business judgment rule, under Delaware law, but the Minnesota law for review of appraisal and arbitration,

which involves a fraud and bad faith standard. Hence, Van Gorkom is inapposite to Miller's case.

Miller apparently attempts to fit the square peg into the round hole by misciting Van Gorkom. He claims that in Van Gorkom:

> The court determined that an appraisal of a shareholder stock that was less than book value and ignored such factors as accumulated depreciation was questionable.

Pet. at 13. In reality, the failing addressed by the Delaware Supreme Court was that the directors of TransUnion never utilized any valuation study, neither by an independent investment banker (as utilized by the Peavey directors) nor by outside experts (as conducted for Miller's shares) nor by even its own management. 488 A.2d at 876. Instead, the TransUnion

> Board had not made any study of the intrinsic or inherent worth

> of the Company; nor had the board even discussed the inherent value of the Company prior to approving the merger . . .

Id. at 891. It was the absence of a valuation study, combined with misleading proxy statements that implied that the Board knew the value of the Company, that doomed the TransUnion directors. Id. Contrary to Miller's contention, the Delaware Supreme Court did not examine the merits of an appraisal report. There was simply none to examine.[10] Van Gorkom is thus irrelevant to Miller's contentions.

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[10] Miller's references to the Delaware court's findings concerning the appraised price being below book value and ignoring accumulated depreciation are nowhere to be found in Van Gorkom. Moreover, the significance of this point is difficult to understand where the $180 million paid to Peavey shareholders was virtually identical to Peavey's book value. (St. of Case, supra at 12.)

V. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT LACKED JURISDICTION TO EXAMINE THE MERITS OF THE ARBITRATORS' DECISION.

A. Minnesota Law Precludes Judicial Review Of Binding Arbitration Unless A Showing Is Made That The Arbitrators Acted In Bad Faith.

Like many states, Minnesota has adopted legislation protecting the rights of shareholders who dissent from mergers and consolidations. The Minnesota dissenting shareholder's statute permits a dissenting shareholder to demand an appraisal of the "fair cash value" of his stock. M.B.C.A. §301.44. Fair cash value is determined by three appraisers, one of whom is named by the shareholder, another by the corporation, and the third who is chosen by the other two. M.B.C.A. §301.40(2).

Miller demanded an appraisal pursuant to M.B.C.A. §§301.40 and

301.44.[11] Acting pursuant to Minnesota law, as well as the district court's elaboration of the applicable statutory procedures, the arbitrators determined unanimously that the fair cash value of Miller's shares, at the time of merger, was $30.00 per share. As a Minnesota corporation, Peavey was bound by the Minnesota appraisal regimen and by the arbitrators' determination.[12] So, too, is Miller.

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[11] The district court found that the legislative history of M.B.C.A. §301.40(2) and Minnesota case law contemplated that the appraisal proceeding would be subject to the Minnesota Uniform Arbitration Act, Minn. Stat. Ann. §§572.08-572.30.

[12] By its terms, Minnesota's dissenting shareholder appraisal process is binding. M.B.C.A. §301.40(2) states:

> The determination of a majority of the appraisers in good faith made shall be binding on all demanding shareholders and the corporation. . . .

(Emphasis supplied.)

The Minnesota courts have frequently examined the nature of binding non-judicial determinations in the context of arbitration proceedings. Their consistent finding is that, under Minnesota law, courts cannot examine the merits of the arbitrators' decision. Even in the face of a mistake of law, Minnesota courts refuse to invade the province of the arbitrators. City of Bloomington v. Local 2828 of the American Federation of State, County & Municipal Employees, 290 N.W.2d 598, 602 (Minn. 1980).[13] In David A. Brooks Enterprises, Inc. v.

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13 See also Ozark Airlines, Inc. v. National Mediation Board, 617 F. Supp. 400, 402 (D.C. Mo. 1985) aff'd in part, rev'd in part on other grounds, 797 F.2d 557 (8th Cir. 1986) (The common law arbitration principle of functus officio precludes the courts and the arbitrators from redetermining the merits of an award.); Air Line Pilots Association v. Northwest Airlines, Inc., 498 F. Supp. 613, 618 (D. Minn. 1980) (The court cannot reexamine the merits of an arbitrator's award.)

First Systems Agencies, 370 N.W.2d 434 (Minn. App. 1985), the Minnesota Court of Appeals considered an arbitrator's award of prejudgment interest which was at odds with a Minnesota statute. 370 N.W.2d at 436. In confirming the arbitrator's decision, the court cited "strong preference in Minnesota for upholding the finality of an arbitrator's award" and held that an arbitrator's award is "not impeachable for a mistake of law" in the absence of bad faith or failure to exercise honest judgment. Id. See also David Co. v. Jim W. Miller Const., Inc., 428 N.W.2d 590, 593 (Minn. App. 1988) ("An award may not be overturned, even if a court believes it to be incorrect.").

While Miller claims without support that the arbitrators' report is substantively flawed, the district court properly refused to review that report.

Simply put, under Minnesota law, courts are not permitted to impose their own judgment of whether a decision pursuant to a binding appraisal is complete, accurate or fully substantiated.

The Minnesota Supreme Court has expressed this precept of judicial non-interference in unequivocal terms:

> The arbitrators make the final determination of all questions submitted to them whether legal or factual. The court will not overturn these conclusions even if it believes the arbitrators made an incorrect conclusion. If arbitrators' decisions were subject to reconsideration by the courts, arbitration proceedings would work merely to delay final decisions of controversies rather than bring them to speedy resolution.

Eric A. Carlstrom Construction Co. v. Independent School District No. 77, 256 N.W.2d 479, 483 (Minn. 1977), quoting Grudem Brothers Co. v. Great Western

Piping Corp., 297 Minn. 313, 316, 213 N.W.2d 920, 922 (1973).[14]

The federal courts have also considered the limited scope of judicial review of a binding arbitration permitted under Minnesota law. For example, in Sanitary Farm Dairies, Inc. v. Gammel, 195 F.2d 106 (8th Cir. 1952), the Eighth Circuit Court of Appeals considered an attack on an appraisal to determine net earnings. The district court examined the merits of the appraisal and held that the appraised values were inadequate. However, the Eighth Circuit Court of Appeals reversed, holding that, under

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[14] See also Koranda v. Austin Mut. Ins. Co., 397 N.W.2d 357, 361 (Minn. App. 1986); Kostrzewski v. Pennsylvania General Ins. Co., 364 N.W.2d 910, 911 (Minn. App. 1985); AFSCME Council 65, Local Union 667, Aitkin County Courthouse Employees, AFL-CIO v. Aikin County, 357 N.W.2d 432, 436 (Minn. App. 1984) (reversing trial court decision to vacate and remand arbitration award as "invad[ing] the jurisdiction of the arbitrator").

Minnesota law, the effect of submitting to an appraisal was to leave the parties:

> [W]ithout any right to escape such accounting result as might thus be produced, except as that result could be claimed to rest on fraud or on mistake so gross as to have amounted to legal irresponsibility in the undertaking.

Id. at 111. The legal effect of delegating the matter to the appraiser was to entrust the valuation "to the judgment, discretion and skill of the selected expert." Id. at 113. Under Minnesota law, the "appraisal result cannot be judicially examined as a mere question of adequacy or inadequacy of amount but only as an issue of moral infirmity. . . ." Id. at 114.

There is a compelling public policy reason for judicial deference to an arbitration award:

> The overriding purpose of the Arbitration Act is to encourage an informal, speedy, and relatively inexpensive resolution of

> disputes arising out of commercial transactions. . . . (Citation omitted.) When the parties have agreed to avail themselves of the benefits of arbitration, judicial interference should be kept to a minimum.

AFSCME Dist. Coun. 96 v. Ind. Sch. Dist. 381, 351 N.W.2d 33, 35 (Minn. App. 1984). The court of appeals' conclusion that the district court lacked jurisdiction to review the arbitrators' decision in the absence of evidence that the arbitrators had acted in bad faith is thus richly supported by Minnesota case law.

B. Miller Adduced No Evidence That The Arbitrators Acted In Bad Faith.

In affirming the district court, the Ninth Circuit concluded that:

> Miller presents no evidence that the appraisers acted in bad faith when they determined the value of his stock.

Pet. App. at 28. This conclusion is sound. Miller contended before the court

of appeals that the appraisers erred in relying on interviews with top executives of Peavey, ConAgra and Goldman Sachs. Miller also attacked the asset evaluations performed by the appraisers for their failure to engage in a physical appraisal of each particular asset owned by Peavey in 1982.[15] However, Miller has never adduced evidence of moral infirmity, bad faith or fraud on the part of the arbitrators. The burden of proof to set aside an arbitration award is a "clear showing the arbitrators were unfaithful to their obligations." David Co. v. Jim W. Miller Const., Inc., 428 N.W.2d 590, 593 (Minn. App. 1988)

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[15] The arbitrators addressed and rejected Miller's demand for a physical appraisal, concluding that such an evaluation would overlook functional and economic obsolescence as well as the special purchase and nature of most of Peavey's fixed assets. (St. of Case at 14.) Of course, such an appraisal would also be prohibitively expensive.

(emphasis supplied). As the court of appeals observed, Miller merely "asked the district court to remand the report to the panel and order it to use a different appraisal method." (Pet. App. at 27.)

VI. MILLER FAILED TO DEMONSTRATE THAT A RESUBMISSION TO THE ARBITRATORS WAS JUSTIFIED UNDER THE MINNESOTA UNIFORM ARBITRATION ACT.

A. The Arbitrators' Decision Was Not Imperfect In Form And Contained No Evident Miscalculation.

The power to resubmit an arbitrator's award for correction or modification is governed by statute. See International Union of Electrical & Machine Workers of America, Local No. 1140 v. Portec, Inc., 228 N.W.2d 239, 241 (Minn. 1975) ("The district court's power to vacate or modify an arbitrator's award is purely statutory."). Minn. Stat. Ann. §572.16 provides, in relevant part, that:

> On application of a party or, . . . on submission to the

> arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in clauses (1) and (3) of Subdivision 1, Section 572.20, or for the purpose of clarifying the award. . . .

The grounds stated in Minn. Stat. Ann. §572.20, Subd. 1, clauses (1) and (3) are as follows:

> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> . . . .
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Minn. Stat. Ann. §572.20, Subd. (1) (1978). Both clauses are "limited on their face to technical errors and irregularities in the award which do not affect the merits." Portec, supra at 243. Miller's request that the appraisal of his stock be remanded for correction

fails to meet either standard of Minnesota Uniform Arbitration Act §572.20. There is no evident miscalculation, nor is the award imperfect as a matter of form. Miller does allege that the arbitrators failed to undertake a physical asset appraisal; however, the district court's judgment of February 27, 1984, from which Miller did not appeal, did not require such an appraisal. Rather, the court provided that the arbitrators had discretion to select an appropriate approach to valuation:

> [I]n determining the fair cash value of Miller's shares, the panel shall consider all factors which <u>it</u> determines to be relevant.

(Pet. App. at 40, ¶10; emphasis supplied.) Miller's failure to appeal from the February 27, 1984 judgment estops Miller from attacking the arbitrators for failing to undertake a

physical asset appraisal. The judgment entered by the district court provided the arbitrators with discretion to consider the factors they deemed relevant. This was the "submission to the arbitrators by the court under such conditions as the court may order." Minn. Stat. Ann. §572.16.[16]

Having set forth the procedures for the arbitrators to follow, and in the absence of any showing of fraud or misconduct, or mistakes in calculation or form, the district court's limited role upon Miller's request for a remand was to determine whether the panel had complied with the district court's prior judgment.

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16 Rather than appealing from this judgment, Miller elected to permit the arbitration panel to work for two years, at an expense to Peavey of over $94,000.00. Then, after the arbitrators rendered their decision, Miller asked for a remand on the basis that they used their discretion as instructed by the district court, and as contemplated by Minnesota law.

Simply put, Miller has provided no legal basis to justify judicial interference with the arbitrators' decision. Before the court of appeals, and again in his Petition, Miller points to no fraud or evident miscalculation by the appraisers. At most, Miller has shown that the arbitrators, acting on the basis of their own informed judgment, failed to give credence to Miller's theories of valuation. Even if this were a mistake, which it was not, it was one which the arbitrators were entitled to make.

The district court thus acted properly in declining Miller's invitation to review the merits of the arbitration panel's valuation decision, and the Ninth Circuit correctly concluded that the district court was without jurisdiction,

under Minnesota law, to engage in such an examination.

B. The Minnesota Uniform Arbitration Act Bars Miller's Untimely Request To Remand The Arbitrators' Decision.

Minnesota law provides that a party has 20 days from the delivery of the arbitrator's decision to request that the court resubmit the award to the arbitrators for "vacating or modifying or correcting . . ." Minn. Stat. §572.16. The Minnesota courts strictly enforce this 20-day rule. In Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182, Crosby-Ironton, 285 N.W.2d 667, 670 (Minn. 1979), the Minnesota Supreme Court refused to examine the claimed grounds for reexamining a labor arbitration award because the objecting party had failed to apply for resubmission of the matter within the statutorily mandated 20-day

period. 285 N.W.2d at 669. The court based its decision to enforce strictly the 20-day statutory period on both established precedent and on Minnesota's public policy of encouraging arbitration to promote expeditious dispute resolution.

While the arbitrators' report was submitted to the district court on April 22, 1986, Miller did not request resubmission to the arbitrators until July 11, 1986 (or, at the earliest, at the June 23, 1986 status conference before the district court wherein Miller raised objections to the report). Miller's 42-day delay does not fulfill the 20-day statutory requirement. Therefore, even if Miller could otherwise appeal the arbitrators' decision (and assuming that his appeal could be brought in Arizona rather than Minnesota), his

appellate remedy is precluded because of his own delay in acting.

VII. MILLER'S FRIVOLOUS PETITION FOR A WRIT OF CERTIORARI SUPPORTS AN AWARD OF APPROPRIATE DAMAGES TO RESPONDENTS.

Miller received everything he sought in the district court: (1) an arbitration proceeding in accordance with the Minnesota dissenting shareholder's statute; and, more specifically, (2) judicially declared procedures for conducting the arbitration. Nonetheless, Miller wants more. He desires to ignore his First Amended Complaint, to re-write his pleadings, and to seek declarations on the substance of the arbitrators' ruling (as opposed to the procedural resolutions he requested). In doing so, he criticizes the district court and the court of appeals for not remanding the matter to the arbitration panel to impose a physical asset appraisal method on

their deliberations. Miller engages in his vociferous criticism despite the fact that he never properly challenged the results of the arbitration panel's efforts and he never appealed the district court's declaratory judgment that the arbitrators could use the valuation method they deemed appropriate.

Miller's disdain for the arbitrators' conclusions, as well as the rulings of the district court and the court of appeals, must be viewed in light of Miller's own conduct. The arbitrators requested Miller to appear before them. He refused. Peavey consistently requested Miller to negotiate a price or set a price that he felt his 1,100 shares were worth. He refused. The arbitrators requested the parties to engage in settlement negotiations in an effort to avoid the substantial expense associated

with a detailed appraisal. Miller refused. The arbitrators requested Miller to present material supporting his contention that the net assets of Peavey had a value greater than the purchase price. He refused.

Miller's seven-year effort to obtain more for his shares than any other shareholder received, and more than the experts unanimously agreed that they were worth, has cost Peavey approximately $250,000.00 in appraisal fees, appraisal expenses, legal fees and costs. Miller has forced Peavey to defend against claims not properly asserted and to support the entirely rational conclusions of expert appraisers through the district court, the court of appeals, and finally, this Court. His goal, by any reasonable assessment, was doomed from the start. Nevertheless, Peavey has been subjected

to needlessly protracted proceedings and has suffered damages as a consequence.

Accordingly, Peavey respectfully requests this Court to recognize Miller's Petition for Writ of Certiorari for what it is--frivolous. Pursuant to Rule 49.2, Rules of the Supreme Court of the United States, Peavey, therefore, requests that damages be assessed against Miller in an amount equal to the legal fees and related expenses incurred by Peavey in defending against Miller's Petition in this Court.

VIII. CONCLUSION.

For the foregoing reasons, this Court should deny Miller's Petition for a Writ of Certiorari and award respondents damages against Miller.

RESPECTFULLY SUBMITTED,

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